EXCISE

(447)

DEPARTMENT OF STATE
THE LEGAL ADVISER

February 23, 1968

TO : L - Mr. Salans

FROM : L/C - Ernest L. Kerley

SUBJECT: Computation of U.S.S. Liberty personal injury claims

In the U.S.S. Liberty personal injury claims, the compensation sought for each of the claimants will, in accordance with established legal precedent, be based on the nature and severity of the injuries, pain and suffering, and lost future earning capacity.

Justice Holmes described the process whereby the jury arrives at a lump sum payment for personal injury as "a mere guess." Slater v. Mexican Nat'l R.R., 194 U.S. 120, 128 (1904). In this process, the jury is instructed to arrive at a judgment, taking into account all the evidence it has heard, and appellate courts regularly decline to change the amount unless it is so grossly inflated or inadequate as to indicate that the jury was motivated by prejudice. While it is accordingly not possible to reduce the computation of the personal injury claims to an automatic formula of the sort we used with the death claims, it is still necessary for us to have guidelines in arriving at the amount to be claimed. We have accordingly reviewed the personal injury judgments reported in the West Reports, and have tabulated those cases in which the judgment indicates the portion of the judgment which related to the nature and severity of the injuries and the pain and suffering, and the portion which related to lost future earning capacity.

DEPARTMENT OF STATE A/CDC/MR
REVIEWED BY Wm Kelley DATE 1/24/83
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ATTACHMENT NO. 17 (#447)

Tab A is a tabulation of awards relating to the nature and extent of the injury and pain and suffering. These awards range from $1000 to $24,500. In general, it appears that injuries not involving a significant residual effect are unlikely to bring more than $5000, and that awards over $20,000 generally involve what would be considered extremely serious injuries. The length of hospitalization is a rather unreliable criterion, though judgments of $5000 or less seem generally to involve cases where the hospitalization was for a week or less, and judgments of $20,000 or more are likely to involve hospitalization for six weeks or more. (Note, however, that in the Hanson case seven weeks in the hospital was only worth $6000.) For lack of a formula promising greater precision, we propose to compensate for nature and severity of injury and pain and suffering on the following bases:

1. Low awards, under $5000, would be characterized by no significant residual effect, hospitalization for one week or less, and moderate pain as estimated by the treating physician.

2. Intermediate awards, between $5000 and $20,000, would be characterized by significant residual effect, hospitalization from one to six weeks, and severe pain.

3. High awards, over $20,000, would be characterized by severe residual effect, hospitalization over six weeks, and very severe pain. We would not expect these awards to exceed $30,000, but we would not wish to limit the awards to $30,000 a priori.

The characterizations are only guides, of course, and a factor of judgment would be involved both in categorizing the injuries as "low," "medium," or "high" and in fixing the actual amount within those categories.

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It will be noted here that we refer to "residual effect" rather than to "residual impairment." The terms are not synonymous. By residual effect we mean any permanent or long-term result of the injury which causes mental or physical suffering. It is irrelevant, for purposes of computing the compensation to be claimed for suffering and the nature and severity of the injury, whether the residual effect reduces the future earning capacity of the claimant. Permanent impairment of earning capacity is a separate element of the claim, compensation for which is computed separately. Of course, the same injury may produce both a residual effect and a permanent impairment of earning capacity, and may thus be relevant in the computation of compensation for both elements of the claim.

There is a special problem in connection with the "low awards." A substantial number of our personal injury cases involved extremely minor injuries, where no hospitalization was required and the injured man continued on duty status. In many of these cases, the treating physician, in answering the question in our PI-2 form as to whether the pain and suffering was "moderate," "severe" or "very severe," answered "minimal." These injuries appear to be significantly less than the injuries in Jobe v. Credure, which, at $1000, involves the lowest award listed in Tab A. We propose to claim compensation for these injuries at $200, $300, $400 or $500, depending on the severity of injury within these small claims.

I intend to have several members of L/C, working independently, fix the amount for each claim, with discussions involving all members of the office where there is significant disagreement on the amounts proposed. I would also welcome your reviewing the amounts to the extent your time permits.

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Tab B is a tabulation of awards relating to loss of future earning capacity. The awards range from $11,000 to $100,000. The Stanford case, also included in the tabulation, indicates that percentage of disability of a single part of the body, e.g. the leg, may not be used in a direct multiplication of probable future salary to arrive at the loss of future earning capacity. The rationale may be, though it is not stated by the court, that a 10% disability of the leg is not equivalent to a 10% loss of earning capacity. We propose to calculate probable future income using the same formula that we used in the "loss of support" part of the death claims. The portion of total future income which will probably be lost because of the disability necessarily involves the determination of a percentage of lost earning capacity, and multiplying the total future income by that percentage. Arriving at the percentage of lost earning capacity is a matter of judgment, of course, but less than ten claims involve permanent impairment, so we will be able to discuss each case thoroughly within L/C. You may consider that these cases especially warrant your review.

Another special problem arises in connection with certain permanent impairment claims in which, because the claimants are young and unmarried, the Navy pay scales do not accurately reflect their earning potential. For such men the Navy pay scales are unreasonably low by civilian standards; indeed, the scales for such men would not even meet the minimum standard which would be required by the Federal Minimum Wage Law, if their income were earned in civilian life. Nor do the Navy pay scales for these men meet the standard which those same pay scales would have set when the men had become older, and their Navy income had been augmented by dependents' allowances and length of service increases. This problem did not arise in the death cases since loss of support was claimed only where there were dependents,

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and where, accordingly, the decedent's salary had already been increased by allowances. The "loss of support" formula used in the death cases produced a valid, though conservative, extrapolation of the probable future earnings of the deceased because the base pay period -- the period between 20-29 years of age -- included sufficient allowances to make the monthly pay for that period, and the increases projected for subsequent ages, reflective of the actual earning potential of the decedent. If that formula is to produce a valid result in permanent impairment claims on behalf of young, unmarried sailors, a minimum salary for the period between 20-29 years, reasonably equivalent to the claimant's actual earning capacity during that period, must be used as the basis of calculation. Under the Federal Minimum Wage Law a person could not, in full-time employment covered by the statute, earn less than $3328 per year ($1.60 per hour). There is no valid reason to assume, however, that men of the above-average ability which characterized the crew of the U.S.S. Liberty would have been employable only at the minimum statutory level. Even if men of such ability were employable only at the minimum level at the beginning of the 20-29 year period it is hardly conceivable that they would have been earning so little by the end of that period. An annual salary of $4160 ($2.00 per hour) would, in these circumstances, be a conservative, thoroughly defensible estimate. In the death claims, the salaries of the nine enlisted men for the period 20-29 years, on which the loss-of-support calculation was based, ranged from $3,992 to $7,278. The average was $5,497. (In making this calculation of average salary, it was necessary to reduce the salary actually being earned by some of the older decedents to the 20-29 year level.) We accordingly propose to use, as the salary for the period 20-29 years, either the actual salary being earned by the claimant or $4160, whichever is greater. This figure

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is close to the lowest salary used in computing the death claims, and well below the average of the salaries in the death claims. It is sufficiently conservative to justify its use, despite the elements of conjecture involved.

Tab C is the computation form we propose to use in the personal injury claims.

Tab D illustrates how a few typical claims would work out.

Attachments:

As described above.

L:L/C:ELKerley:ams

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TAB A - Nature & Severity of Injury & Pain & Suffering

Case	Injuries	Treatment	Judgment
Jobe v. Credure, 125 So. 2d 487 (Ct of Ap., La., 1961) Car-truck collision	Middle-aged man. Moderately severe cerebral concussion, minor bruises, abrasions to forehead and knees.	Hospitalized 8 days; confined at home 10 days; limited activity 7-1/2 weeks	$1,000
Woode v. Kabela, 128 N.W. 2d 241 (Sup. Ct, Iowa, 1964) Auto accident	Wife. Bruises on arms, soreness in upper back, back pains for over a year.	Under treatment by doctor for a year	$1,500
Little v. Safeguard Ins. Co., 137 So. 2d 415 (Ct of Ap., La., 1962) Auto accident	12 year old girl. Contusion of right side of face and lip, severe strain of both ankles, right ankle partially calcified and painful after strenuous activity.	Hospitalized 3 days	$2,000
Woode v. Kabela supra	Husband. Accident activated prior neurotic condition leading to physical decline.		$2,108
Raiff v. Yellow Cab Co. of Providence, 176 A.2d 718 (Sup Ct, R.I, 1962) P was passenger in cab involved in cab-auto accident	Wife. Contusion of right shoulder, consequent bursitis of right shoulder, contusion of right elbow, contusion of left chest wall, sprained right ankle, lumbosacral strain, whiplash to neck.	Inactive at home 8 weeks	$3,200

Case	Injuries	Treatment	Judgment
Little v. Safeguard Ins. Co., supra	12 year old girl. Severely bruised face, broken nose which is now "assymetrical" but which could be corrected by surgery; continuing headaches.	7 days in hospital	$3,250
Bernat v. DeGasparre, 129 A.2d 545 (Sup. Ct., R.I., 1957) P was passenger in cab involved in cab-auto accident.	Man. 4 fractured ribs; lacerated forehead; contusion and abrasion of right knee. P claimed pain so severe he was unable to work for several months.	Hospitalized 1 day	$4,500 (criticized by Sup.Ct. as excessive)
Budick v. State, 164 N.Y. Supp. 2d 115 (Ct of Claims,N.Y., 1957) Car wreck at defectively-marked intersection.	17 year old girl. Cerebral concussion, lacerated left knee, laceration over right eye. Facial scar correctable by plastic surgery.	Hospitalized 3 weeks. Confined to house 2 months	$4,750
Smithy v. Sinclair Refining Co., 122 S.E. 2d 872 (Sup.Ct., Va., 1962) Car-truck collision.	Man. "Crushing injury to chest" but no broken bones, multiple contusions and lacerations of left arm and right knee, sprain of the spine, residual soreness of spine.	Confined home 7 days	$5,000

Case	Injuries	Treatment	Judgment
Allen v. Brooks, 124 S.E. 2d 18 (Sup.Ct.,Va., 1962) Car hit unlighted parked truck on foggy night.	68 year old man. 3 fractured ribs, cuts and bruises on face, arms and legs, continuing weakness and pain.	Hospitalized 3 weeks, confined home 5 weeks	$5,018
Hanson v. Reiss Steamship Co., 184 F.Supp. 545 (Dist. Ct., Delaware, 1960) Seaman fell while making third mate's bunk, hitting back on edge of bunk.	Man. Injury of spine. Right leg numb, continuing inability perform heavy work, pain in back continuing indefinitely in future.	Hospitalized 7 weeks (in traction 3 weeks)	$6,000
Little v. Safeguard Ins. Co., supra	12 year old boy. Large laceration of scalp, bruised and swollen face, dislocation of both ankles, left foot broken in 3 places, right leg will require surgery, 20% disability in left leg. Arthritis will develop in left foot.	Hospitalized 16 days, confined home 6 weeks	$6,000

Case	Injuries	Treatment	Judgment
Husak v. Omaha Nat. Bank, 86 N.E. 2d 604 (Sup.Ct., Neb., 1957) Woman struck on shoulder by crow-bar dropped from third floor window.	44 year old woman. Severe bruise and contusion of right shoulder; inability to raise right arm above shoulder (now partially corrected), pain continuing indefinitely.	Hospitalized 10 days; confined at home 20 days	$9,000
Brandon v. Elliston, 109 So. 2d 687 (Sup.Ct., Ala., 1959) Fall caused by excessive wax on floor of department store.	Middle aged woman. Broken femur requiring bone graft operation.	Hospitalized 57 days	$10,000
Atlanta Life Ins. v. Stanley, 165 So. 2d 731 (Sup.Ct., Ala., 1964) 3 car collision.	Middle aged woman. Acute sprain of spine, multiple contusions of legs, arms and chest. Pain in neck likely to be permanent; continue to use neck halter traction on indefinite basis.	Hospitalized 8 days	$10,000
Ragon v. Day, 306 SW2d. 687 (Sup. Ct., Ark., 1957) Rear end collision.	Young man. Cerebral concussion, dislocated shoulder, compressed fracture of neck. Permanent stiffness and pain in neck.	Hospitalized 26 days; plaster cast 6 weeks	$10,000

Case	Injuries	Treatment	Judgment
Stanford v. Bateman Frozen Foods Co., 149 So.2d 753 (Ct. of Ap., La., 1963) Tractor-trailer pulled out in front of P.	Young man. Comminuted fracture of tibia which became ulcerated and did not heal for 17 months. Two operations.	Hospitalized. In plaster cast 3 months.	$10,000
Cully v. Pa. R. Co., 244 F.Supp. 710 (Dist. Ct., Del, 1965) Passenger injured in train wreck.	Middle aged man. Broken disk in spine, contusions of back and buttocks. Operation on back, severe pain 6 days. Permanent weakness of back.	Hospitalized 6 weeks	$12,000
Frentz v. U.S., 163 F. Supp. 698 (Dist.Ct.,La., 1958) Drawbridge raised while pedestrian crossing it.	78 year old man. Broken legs. Great pain in past, some continuing.	Hospitalized 2 months; traction at home, plaster cast 11 months.	$12,000
Horan v. Klein's-Sheridan Inc., 211 N.E. 2d 116 (Ct. of Ap., Ill., 1965) Beautician used wrong chemicals in giving P a cold wave.	Young woman. First degree burns from forehead to chest, second degree burns on top of head and behind ears. Burns healed in two weeks, but permanent loss of hair over forehead and ears.	Medical treatment at home for 2 weeks.	$12,500

Case	Injuries	Treatment	Judgment
Gunter v. Lord, 132 So. 2d 488 (Ct. of Ap.,La., 1961) Car ran off road into ditch.	Woman. One (possibly two) herniated disks, chondritis of knee. Surgery for both injuries. Continuing pain.	Not indicated.	$13,000
Andryshin v. Ballinger, 16 A. 2d 867 (Sup.Ct.,N.J., 1960) Hit by truck.	69 year old man. Broken left thigh and pelvic bone, permanent shortening of leg requiring use of cane, continuing pain.	Hospitalized 6 weeks.	$19,600
DeArmand v. Turner, 297 P.2d 57 (Ct. of Ap., Cal., 1956) Drunken driving; P was passenger.	Woman. Broken breastbone, broken femur, left arm broken above and below elbow, broken and dislocated ankle. Two operations.	Hospitalized 7-1/2 weeks, complete body cast 10 months, in wheelchair 6 months.	$20,000
Imperial Oil Ltd. v. Drlik, 234 F.2d 4 (6th Cir., 1956) Sudden taughtening of winch cable flipped dockman in air.	64 year old man. Broken left shoulder, 6 broken ribs, broken fibula, left ankle broken in two places. Developed severe phlebitis right leg, complications left leg and chest. Continued dizzy spells and headaches.	Hospitalized 6 weeks.	$20,400
Sargent v. Malcomb, 146 S.E. 2d 561 (Sup. Ct., W.Va., 1966) Restaurant employee burned in kitchen.	17 year old girl. Second and third degree burns on back, buttocks, breast, arm and leg. Extensive, painful skin grafting. Scarring not fully correctable.	Hospitalized 8 weeks	$22,500

Case	Injuries	Treatment	Judgment
Painter v. Knaus Truck Lines, Inc., 375 S.W. 2d 19 (Sup. Ct., Mo., 1964) Auto-truck collision.	48 year old man. Brain concussion, separation of cartilege between ribs resulting in permanent pain, loss of left kneecap, unspecified injuries to left ankle and foot.	Not indicated.	$24,500

TAB B - Loss of Future Earning Capacity

Case	Injuries	How Calculated	Judgment
Stanford v. Bateman Frozen Foods Co., 149 So. 2d 753 (Ct. of Ap., La., 1963) Tractor-trailer pulled out in front of P.	Young man. Comminuted fracture of tibia which became ulcerated and did not heal for 17 months. Two operations.	P had permanent disability of leg of 10-15%. Trial ct. multiplied weekly salary of $60 through life expectancy of 42 years and took 10%, which equals $5000. Appellate ct. rejected the use of formula and remitted $5000.	0
Barnhart v. American Oil. Co. 237 F. Supp. 492 (Dist. Ct., Va., 1965) P fell from company truck.	Man. Broken foot, permanently walks on outside of foot.	P suffered no loss of income; took other job which now pays more. Ct. said this not relevant since question is loss of earning capacity.	$11,000
Imperial Oil Ltd. v. Drlik, 234 F. 2d 4 (6th Cir., 1956) Sudden taughtening of winch cable flipped dockman in air.	64 year old man. Broken left shoulder, 6 broken ribs, broken fibula, left ankle broken in 2 places. Post accident complications.	P rendered permanently unemployable. Trial ct. took life expectancy of 14 years times annual salary at time of accident. Present value $44,550. Circuit Ct. said P would not have worked in hazardous occupation until age 78 and reduced to $34,376.	$34,376

Case	Injuries	How Calculated	Judgment
Ferguson V. Erie R. Co., 235 F.Supp. 72 (Dist. Ct., N.Y., 1964) Seaman splashed caustic chemical in eyes because of defective shovel provided by employer.	Uncorrectable 20/400 in right eye and some deterioration in left eye which will probably get worse.	P now employed at old job, but [illegible] ioration of l[illegible] ld make him un- [illegible] oyable.	$35,000
McWeeney v. New York, N.H. & H. R. Co., 282 F. 2d 34 (2d Cir., 1960) Brakeman hit by freight car.	39 year old man. Crushing injuries. Evidence conflicting but P apparently totally disabled.	Ct. said P had future earning potential of $100,000 over life expectancy. Present value $77,000.	$77,000
Cully v. Pa. R. Co., 244 F. Supp. 710 (Dist. Ct., Del, 1965) Passenger injured in train wreck.	Middle aged man. Broken disk in spine, contusions of back and buttocks. Operation on back. Permanent weakness of back.	P restricted to non-lifting work. Ct. estimated loss of future income, based on past income, at $90,000.	$90,000
Atlantic Coast Line v. Ganey, 125 So. 2d 576 (Ct. of Ap., Fla., 1960) Railroad switchman suffered "traumatic amputation" of left leg.	Young man. Loss of leg.	Ct. said test was loss of capacity to earn rather than loss of earnings.	$100,000

FORM E Personal Injuries to Claimant

A. Description of Injuries _____

_____

_____

_____

_____

_____

B. Doctor's description of pain normally attendant on such injuries: _____

C. Description of Treatment

1. List hospitals and dates _____

_____

_____

_____

_____

2. Days hospitalized _____

3. Treatment while hospitalized and dates _____

_____

_____

_____

_____

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4. Outpatient treatment and dates _____

_____

_____

_____

5. Days outpatient treatment _____.

6. Treatment while outpatient and dates _____

_____

_____

_____

7. Other treatment _____

_____

_____

_____

_____

8. Was claimant removed from active duty on June 8, 1967?

_____ If so, when was he returned to duty?

_____

9. Permanent or residual impairment _____

_____

_____

_____

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10. Estimated effect of permanent or residual impairment on claimant's future earning capacity.

_____

_____

_____

_____

D. Claim for severity of injury and attendant pain and suffering.

Low (under $5000) Guidelines: no significant residual impairment, hospitalized week or less, moderate pain. $_____

Intermediate ($5000 to $20,000) Guidelines: some significant residual impairment, hospitalized one to six weeks, severe pain. $_____

High ($20,000 to $30,000) Guidelines: severe residual impairment, hospitalized over six weeks, very severe pain. $_____

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E. Claim for loss of future earning capacity

1. Age of claimant on June 8, 1967. _____

2. Years till 65. _____

3. Salary at time of injury. $_____

4. Projected salary

20-29 salary $_____ x years_____ = $_____

30-39 salary $_____ (130% of above)

x years_____ = $_____

40-49 salary $_____ (120% of above)

x 10 years = $_____

50-59 salary $_____ (110% of above)

x 15 years = $_____

Total $_____

5. Average annual salary:

total salary $_____

_____ years till 65 $_____

6. Lost future earnings: estimated percentage of future earning capacity lost _____%

x total salary $_____. $_____

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7. Annual lost future earnings: estimated percentage of future earning capacity lost _____% x average annual salary $_____ $_____

8. Present value of lost future earnings: annual lost future earnings $_____ x factor _____. $_____

F. Total claimed $_____

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LIST OF CLAIMANTS FOR PERSONAL INJURIES IN BOMBING OF U.S.S. LIBERTY ON JUNE 8, 1967

Claimant	Amount of Compensation Claimed	
[redacted]	$ 23,500	16,823,483
	350	484
	700	485
	200	486
	25,500	487
	200	488
	500	489
	200	490
	350	491
	500	492
	300	493
	200	494
	500	495
	400	496
	200	497
	300	498

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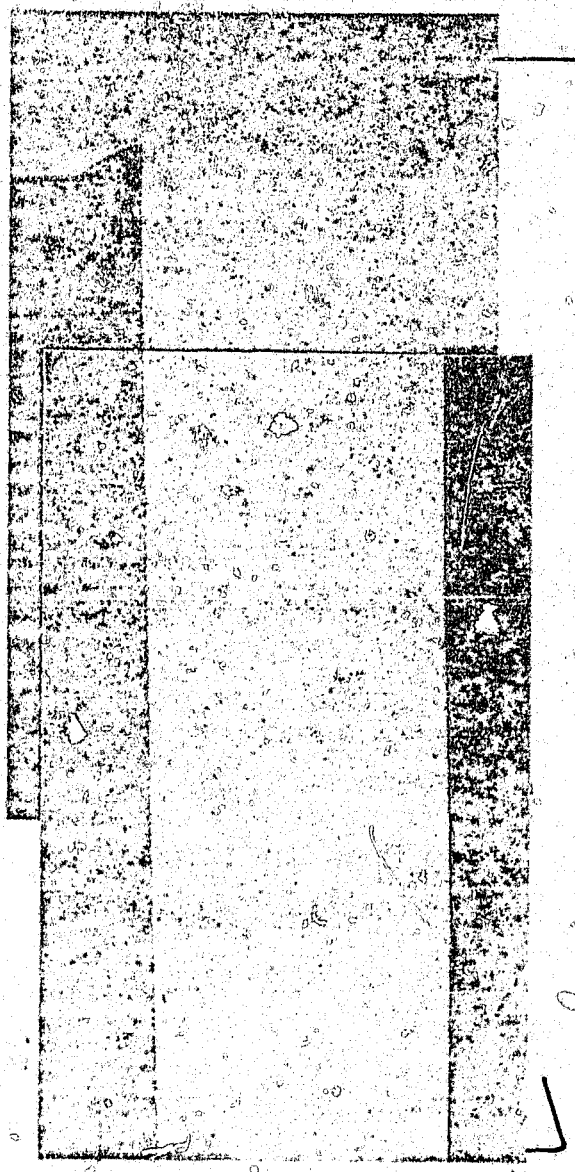

	Amount of Compensation Claimed
$	300 499
	200 500
	200 501
	200 502
	300 503
	198,000 504
	200 505
	250 506
	200 507
	56,000 508
	200 509
	21,500 510
	28,000 511
	200 512
	400 513
	300 514
	61,500 515

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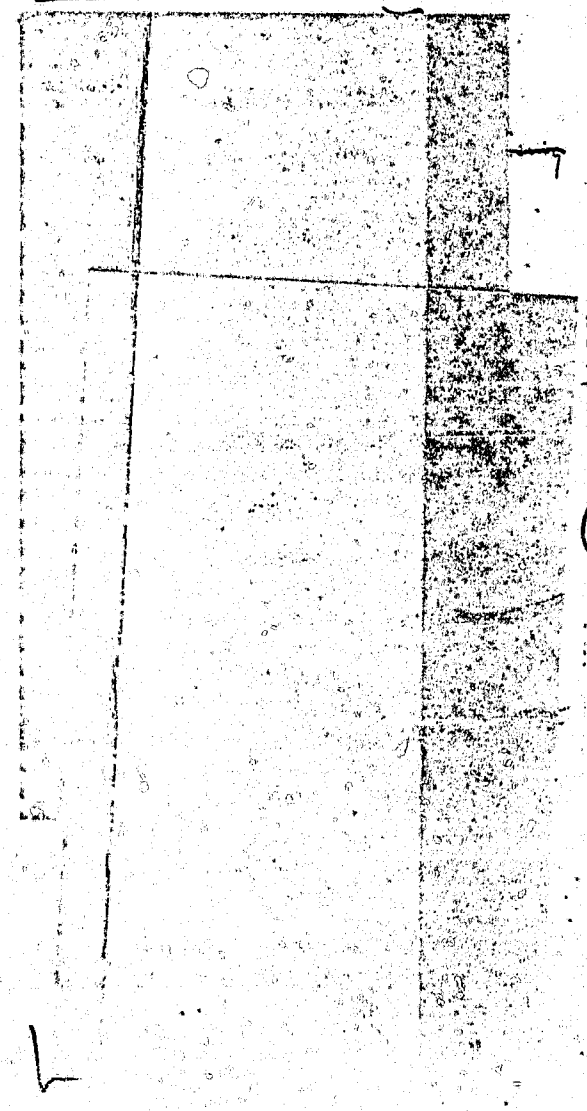
Claimant	Amount of Compensation Claimed	
	$121,000	516
	200	517
	350	518
	200	519
	900	520
	600	521
	300	522
	200	523
	350	524
	500	525
	1,000	526
	350	527
	400	528
	122,500	529
	300	530
	250	531
	200	532



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Claimant	Amount of Compensation Claimed
	$ 400 533
	450 534
	200 535
	1,500 536
	48,000 537
	300 538
	23,000 539
	110,000 540
	18,500 541
	200 542
	42,500 646 (aic)
	350 543
	22,500 544
	300 545
	200 546
	400 547
	250 548

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Claimant	Amount of Compensation Claimed	
[redacted]	$ 300	549
	22,000	550
	250	551
	24,000	552
	23,000	553
	117,000	554
	18,000	555
	1,000	556
	300	557
	2,000	558
	400	559
	260,500	560
	300	561
	75,000	562
	71,500	563
	26,000	564
	200	565

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Claimant	Amount of Compensation Claimed
	$ 200 566
	5,000 567
	200 568
	200 569
	400 570
	64,500 571
	59,500 572
	19,000 573
	500 574
	5,000 575
	300 576
	23,000 577
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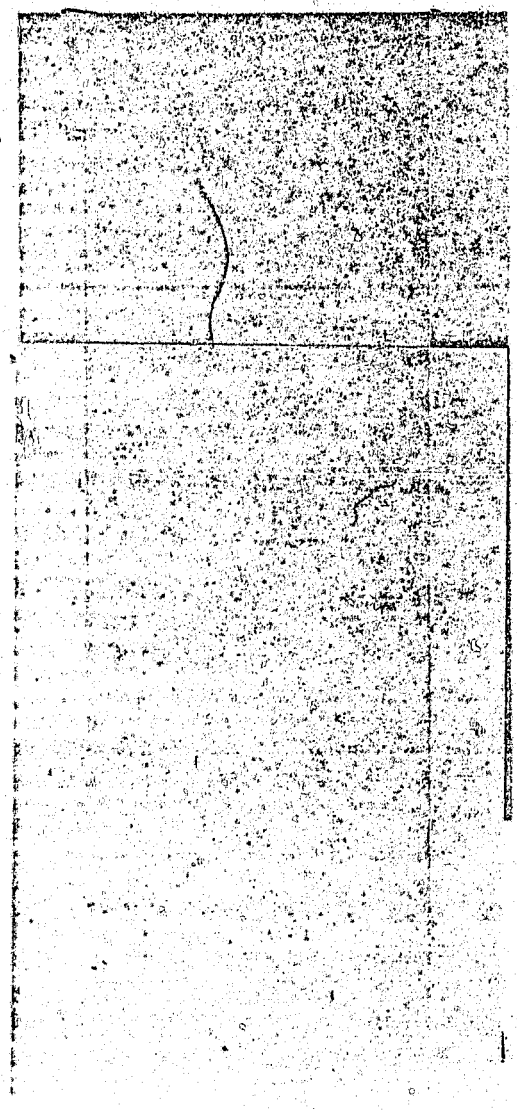
	400 579
	400 580
	200 581
	300 582



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Claimant	Amount of Compensation Claimed
	$ 400 583
	200 584
	147,500 585
	300 586
	300 587
	300 588
	300 645 (aic)
B-6	300 589
	400 590
	200 591
	349,500 592
	300 593
	300 594
	18,500 595
	400 596
	21,000 597
	200 598

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Claimant	Amount of Compensation Claimed
	$ 200 599
	500 600
	300 601
	800 602
	750 603
	241,500 604
	400 605
	18,500 606
	500 607
	300 608
	200 609
	400 610
	200 611
	500 612
	600 613
	400 614
	2,000 615

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Claimant	Amount of Compensation Claimed
	$ 28,000 616
	600 617
	600 618
	200 619
	300 620
	245,000 621
	300 622
B-6	22,500 623
	46,000 624
	300 625
	400 626
	300 627
	80,500 628
	200 629
	600 630
	250 631
	200 632

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Claimant	Amount of Compensation Claimed
	$ 250 644 (sic)
	300 633
	250 634
	400 635
	217,000 636
B-6	250 637
	191,000 638
	275 639
	200 640
	45,500 641
	200 642
	200 643